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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 740.

THE STATE OF OHIO, *ex rel.* THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Relator-Appellant,

vs.

CITY OF EUCLID, OHIO,

and

M. A. SPINO,

Administrative Director of the City of Euclid,

and

KENNETH J. SIMS,

Mayor of the City of Euclid,

Respondents-Appellees.

MOTION OF RESPONDENTS-APPELLEES TO DISMISS APPEAL.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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MOTION OF RESPONDENTS-APPELLEES TO DISMISS APPEAL.

Now come the Respondents-Appellees and respectfully move to dismiss the appeal herein upon the following grounds:

1. The appeal does not present a substantial federal question; and
2. The judgment below rests on an adequate non-federal basis.

PRELIMINARY STATEMENT.

This action originated in the Court of Appeals for the Eighth Appellate District of Ohio (Cuyahoga County) by the filing of a Petition therein, in which The Cleveland Electric Illuminating Company, the Appellant, was desig-

nated as the Relator and thirteen (13) public officers of the City of Euclid were named as Respondents. The Petition prayed for a writ of mandamus commanding each of such thirteen (13) Respondents to issue to the Appellant a permit for the construction of an electric transmission line to carry electric energy at a voltage of 132,000 volts over and across six (6) named streets in the City of Euclid, Ohio.

The Respondents named were the City of Euclid, all of the members of the Council, the Mayor, the Administrative Director and the Law Director.

The officers named refused to issue the permit because there was no ordinance empowering them to issue a permit to cross streets with an overhead transmission line carrying such high voltage current. There was an ordinance provision for underground construction. The Appellant did not elect to apply for a permit for underground construction, but itself determined that the high voltage line was to be constructed overhead, over the six (6) streets.

The Answers of the administrative officers pleaded that there was no ordinance provision whereby they were empowered to issue such permit as prayed for; that appropriate plans showing the work proposed to be done had not been filed; that under the provisions of the City Charter, all of the legislative power of the City was vested in its Council; that the City of Euclid was exercising its powers of local self-government as provided by Sec. 3, Art. XVIII of the Constitution of the State of Ohio; that the City was exercising its police power as granted by said constitutional provision; that the proposed 132,000 volt tower transmission line would endanger the safety of inhabitants of the City and users of the streets named; that such proposed line, if constructed, would increase the hazard of fire, would endanger lives and property, would reduce real estate values, would interfere with radio and

television reception and that any refusal of permission to construct such high voltage transmission line over dedicated streets of the City bore relation to the public peace, safety, health and welfare of inhabitants of the City, and would generally interfere with the comfort and prosperity of the inhabitants of the City.

The Court of Appeals appointed a special master commissioner to take evidence in the case. There were hearings extending over a period of six (6) weeks. Thereafter, the commissioner filed his report of the evidence and his recommendations as to the law of the case. The Court of Appeals directed that a writ issue only against the City of Euclid, its Mayor and its Administrative Director. The Petition was dismissed as to the other named Respondents.

An appeal as of right was made by these Respondents, the Appellees herein, to the Supreme Court of Ohio. The case was briefed and came on for oral argument on the merits on April 29, 1959. On July 15, 1959 the Court announced its decision. The Supreme Court reversed the judgment of the Court of Appeals. Within the rule, the Appellant filed an application for rehearing. The application was allowed and extensive briefs were filed covering the grounds urged in the application for rehearing. On October 6, 1959 the case was re-argued and on November 4, 1959 the Court announced its decision that upon reconsideration of the case, formerly reported in 169 O. S. 476, the Court adhered to its former judgment.

STATUTES INVOLVED.

Appellant sets forth, commencing at page 5 of the Jurisdictional Statement, certain Euclid ordinances claimed to be involved in this action. Omitted is an amendment to Ordinance No. 288-1956 of the City, which provides as follows:

Ordinance No. 265-1957.

By—Mayor Sims

"An emergency ordinance amending and supplementing Ordinance No. 288-1956 which made provision for permits for pole lines and underground work.

* * * * *

"SECTION 1: That Ordinance No. 288-1956, passed December 3, 1956, be and the same is hereby amended and supplemented by adding the following new section to be known as Section 2.2, which shall read as follows:

'SECTION 2.2: PERMIT FOR UNDERGROUND CONSTRUCTION.

In addition to the method of installation described in Section 2.1, of this ordinance, the applicant for a permit to be issued by the Council may use any method of underground construction approved by the Public Utilities Commission of Ohio or the National Electric Code, with or without lead covered cable and to a depth underground approved by such authority.'"

* * * * *

In Ohio it is necessary that a municipality grant its consent to a company, organized for supplying electricity, to occupy streets within the municipality. By virtue of Sec. 4, Art. XVIII of the Ohio Constitution, the City of Euclid may construct, own and operate its own public utility to supply its inhabitants with electricity and "may contract with others" for such product or service. The Appellant claimed below that the Village of Euclid in 1906 entered into a contract with Appellant for providing services to inhabitants of the municipality under Ordinance No. 32 set forth, commencing at page 7 of the Jurisdictional Statement. The Petition was framed around such

ordinance and therein it was alleged that the City of Euclid had altered and abridged the contract set forth in such Ordinance No. 32 by adopting a general ordinance requiring permits. Such ordinance in fact carries out the agreement by the Appellant only to perform work, erect poles or wires and build conduits underground if and when a "proper permit" is first obtained after plans and specifications have been placed on file. Ordinance No. 32 provides that the grant therein is subject to certain conditions and limitations therein expressed, which may be summarized as follows:

1. All "*wires* used by" the Appellant "*shall be properly insulated, and* shall comply with all state regulations and ordinances to be passed by "this village" requiring proper insulation and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland.

2. As a condition precedent to the commencement of any work thereunder by the Appellant, the Appellant is required to submit to "the proper officers" of the village, "*plans, showing the work it proposes to do in the erection of poles, wires, appliances,* or in the building of conduits * * * and they shall be kept on file in the office of the village clerk." (The ordinance does not designate the "proper officers" to receive such permit application or to issue the permit. Such privilege and authority is thereby reserved to the Council.)

3. Such *grant* or consent *was* "subject to all general ordinances now or hereafter in force in said village."

4. No pole or mast could be erected without the consent of the property owner before whose premises such pole or mast is proposed to be erected.

5. The Appellant is required to protect and indemnify the village upon any and all claims for damages which might arise by reason of its exercise of the grant.

6. The location of each pole or mast is subject to the control and direction of the village council and whenever any pole should, in the opinion of the Council, be changed for the best interest of the village, it must be changed by Appellant.

7. Appellant is *required to obtain a permit* from the village for the work it proposes to do, *as shown by the plans so filed*, and thereupon it has the right to proceed with the work *in accordance with the plans and specifications placed on file by it or them*. (Emphasis added.)

The Answers of the Respondents set forth that the Appellant was proposing to string uninsulated wires over such streets contrary to the express provision of Ordinance No. 32, and further that the Appellant had not filed plans and specifications as required by the ordinance. The Answers also pointed up the obligation agreed to whereby the grant was "subject to all general ordinances now or hereafter in force in said village."

THE QUESTIONS PRESENTED.

Four (4) questions are enumerated as being presented by this appeal. The import of Questions 1 and 2 is that the writer of the Opinion in the case in the Supreme Court of Ohio makes statements which counsel challenge with respect to the constitutionality of the ordinances complained of. Although the Court is familiar with the practice and rules in the Supreme Court of Ohio, we, nevertheless, feel it necessary to set forth here the law of Ohio with respect to Opinions, believing it will be most helpful in resolving the questions presented in this appeal, for it

appears that the sole basis urged by counsel, whereby this appeal presents a federal question, is counsel's criticism and complaint regarding the Opinion of the Court.

In Ohio an Opinion does not constitute an order or judgment and forms no part of the record. *Squire, Supt. of Banks vs. Guardian Trust Co.*, 144 O. S. 266; *State ex rel. Sherwood vs. Hoffman, Judge*, 95 O. S. 144, 117 N. E. 10. A Court of record speaks only through its Journal. *State ex rel. Industrial Commission vs. Day*, 136 O. S. 477, 26 N. E. (2d) 1014. The Supreme Court of Ohio, in *Freeman vs. State*, 131 O. S. 85 (89), in its Opinion states that "while in many cases opinions may be desirable for the benefit of bench and bar," there is no constitutional provision requiring a written Opinion.

Sec. 2503.20, Ohio Revised Code, provides for a syllabus in each reported case to be approved by the majority of the Court. Rule VI of the Supreme Court of Ohio provides that in each cause a syllabus of the points decided by the Court shall be stated in writing by the judge assigned to prepare the Opinion, which shall be submitted to the judges concurring for revisal and shall be inserted in the official volume of reports, without alteration, unless otherwise ordered. This rule was originally adopted in January, 1958 and established the principle in Ohio that the syllabus of a Supreme Court decision states the law, or as may be differently expressed, the points decided in the case are found in the syllabus. *Wrede v. Richardson*, 77 O. S. 182. Thus, the Supreme Court of Ohio announces the law solely through the syllabus of the case and through per curiam opinions. *Thackery v. Helfrich*, 123 O. S. 334.

The Supreme Court of the United States has said that the syllabus of a case decided by the Supreme Court of Ohio constitutes the official Opinion of that Court.

Perkins v. Benquet Consolidated Mining Co., 342 U. S. 437. Matter outside the syllabus is not regarded as decision. *Haas v. State*, 103 O. S. 1, 132 N. E. 158. The syllabus is the only part of the Opinion requiring approval of judges concurring in the judgment. *State ex rel. Donahey v. Edmondson*, 89 O. S. 93, 105 N. E. 269. The judge writing the Opinion may discuss matters or give expression to views, but such are merely the personal opinion of the judge.

In case of conflict between syllabus and Opinion, the former governs. The syllabus constitutes a statement of the rule of law, but it is not to be substituted for the Court's order or judgment, from which must be determined the issues decided by the Court. *Burton, Inc. v. Durkee*, 162 O. S. 433, 123 N. E. (2d) 432. In the course of the Opinion it is stated:

> "The purpose and object of rule VI of this court is to distinguish the syllabus, as the point of agreement of all the judges concurring in the opinion, from other statements made in the course of the opinion. The rule does not substitute the syllabus for the court's judgment, from which must be determined the issues decided by the court.
>
> There can be no question that where a judgment becomes final in the course of litigation, it becomes res judicata or the law of the case as to all questions therein decided.
>
> * * * * *
>
> In the case of *Pollock v. Cohen*, 32 Ohio St., 514, Judge Ashburn in the course of the opinion said:
>
> 'It is well settled by authority, and is a doctrine sound in principle, that all questions which existed on the record, and could have been considered on the first petition in error, must ever afterward be treated as settled by the first adjudication of the reviewing court.

(439) 'The time should come, in the history of a cause, when litigation must end. If the failing party was allowed to prosecute a new petition in error, on the same record, whenever he imagined he had discovered a new ground of error not previously assigned, litigation would be interminable. Such a practice would violate well-settled principles of law and be against public policy.' See, also, annotation, 67 A. L. R., 1390 *et seq.*; 11 University of Cincinnati Law Review, 266 *et seq.*"

In the light of the foregoing, the Supreme Court of Ohio speaks through its Journal Entries. In this appeal, they do not disclose the Court refused to consider any of the propositions advanced by the questions presented in this appeal. What counsel quotes from the Opinion is the conclusion of the judge who wrote the Opinion. The law is stated in the syllabus of the case. There is nothing before this Court, not even a scintilla, which in any wise supports the charge that the Supreme Court of Ohio did not consider the entire record which was before it (and which has not been filed in this appeal) and did not consider every contention or proposition advanced by counsel for this Appellant in that Court.

At page 21 of the Jurisdictional Statement, Appellant's counsel sets forth what was urged in their application for rehearing before the Supreme Court of Ohio. They concede by such statement that the propositions advanced by Questions 1 and 2 were specifically set forth in their application for rehearing. The lower court then considered such propositions after Briefs were submitted and the case was re-argued and elected to adhere to its previous decision. Such statement is an admission that this litigant was afforded every opportunity to have presented by learned counsel any and every question to be answered by that Court.

The syllabus in the case appealed, reported in 169 O S. 476, reads:

> "1. A municipal corporation may prescribe reasonable regulations for the installing of electric power lines through or into its territorial limits and may withhold its consent for the installation of such power lines until such regulations are complied with. (Sections 715.27, 4933.13 and 4933.16, Revised Code, construed and applied.)
>
> 2. A municipal ordinance which provides that all electric power lines installed within or through the municipality's territorial limits and carrying greater voltage than 33 KV (33,000 volts) shall be installed underground is not an unreasonable regulation unrelated to the health, safety and welfare of the inhabitants of the municipality."

All of the members of the Court agreed to paragraph 1 of the syllabus while a majority agreed to paragraph 2.

ARGUMENT.

The Brief of counsel for the Appellant does not appear to be responsive to the questions Appellant presents by this appeal. It is not helpful in determining jurisdiction, and failing this it would appear that no valid legal argument is presented whereby this Court has jurisdiction.

Statements from the majority opinion of the Supreme Court of Ohio are taken out of context—even split sentences—and made to conclude that the Appellant, in the Supreme Court of Ohio, had been deprived of its property without due process of law. Counsel argues, as proof that the Supreme Court of Ohio did not decide the questions presented, that an examination of the Opinion of the Court so discloses. We have demonstrated that the Supreme Court of Ohio speaks through its Journal and that there is every legal presumption and intendment that such Court, like every other Court of Appellate jurisdiction, resolved all of the questions which were presented to it and that its decree is res adjudicata.

The Supreme Court of Ohio has jurisdiction under the Ohio Constitution to reverse the judgment of a Court of Appeals. Art. IV, Sec. 2 Ohio Const. The Ohio General Assembly has implemented such provision in Sec. 2505.28, Revised Code.

We have also shown that Appellant's application for rehearing in that Court was allowed and that every opportunity was afforded such counsel to present any new or different questions and propositions and to argue them. We do not believe at this date there could be any substance to the charge that such Court did not consider so-called findings of fact or law in the rendition of its judgment. If there could be any substance, it could only be proven by the judges themselves. Certainly the record in

the case can not be interpreted as lending any support whatsoever to such unfounded charges.

1. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In support of the proposition that the appeal does present a substantial federal question, Appellant contends that the Supreme Court of Ohio refused to review the record and upset the findings of fact or law of the lower Court when it reversed. As we understand the argument, it is this—Appellant has been denied due process because the Supreme Court reversed and, in doing so, declined to consider the findings. To this, the answer is clear and unmistakable that in reversing and rendering a final judgment, such Court considered the entire record before it, which included the so-called findings. To state that the Court did not consider the findings is to assert something which is incapable of proof. That is precisely why in Ohio when a judgment becomes final in the course of litigation, all questions which were or could have been presented have been determined.

There is not, in this appeal, a substantial federal question because findings of fact are upset by the Supreme Court of Ohio. The entire record was before the Court and the Appellant cannot here contend that the judges did not read the record which included the so-called findings.

a. The ultimate question to be determined is whether a writ of mandamus shall be issued by the Court of Appeals for the Eighth Judicial District of Ohio, and that is a non-federal question.

The jurisdiction of such Court of Appeals permits the filing of an original action in such Court for a writ of mandamus. Art. IV, Sec. 6 of Ohio Constitution.

Sec. 2731.01, Revised Code of Ohio, defines "mandamus" as follows:

> "*Mandamus is a writ*, issued in the name of the state to an inferior tribunal, a corporation, board, or person, *commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.*" (Emphasis supplied.)

It is conclusive that the question of the issuance of the writ of mandamus which is the relief prayed for in the Petition must be determined upon local law. There must be a clear showing that there is a dereliction on the part of the Respondent officer to perform the act sought to be coerced and a clear duty to perform which is specially enjoined upon him by law. That must either be the Ohio Constitution, a state statute, a municipal charter or a municipal ordinance. *City of Mt. Vernon v. Berry*, 71 O. S. 428; *State ex rel. Howe Construction Co. v. Meyer*, 70 O. L. A. 246.

As alleged in its Petition, Appellant sets forth a controversy between it and the City of Euclid concerning its franchise contract which it received in 1906 under Ordinance No. 32. Such controversy is not an appropriate subject for a mandamus proceeding. As held in *City of Mt. Vernon v. Berry*, 71 O. S. 428, the third paragraph of the syllabus provides:

> "3. A controversy between the parties to a contract as to their respective rights under the contract cannot be determined in proceedings in mandamus."

To the same effect, this rule is stated in *State ex rel. Libby-Owens-Ford Glass Co. v. Industrial Commission*, 162 O. S. 302.

The Ohio rule with respect to this extraordinary writ of mandamus is not different from the federal rule which requires that it be sparingly exercised. It is an extraordi-

nary remedy available only in rare cases. Before the writ may issue, "a Relator must show a clear legal right to the relief sought as a condition precedent to the issuance of the writ." *State ex rel. Tarpy v. Board of Education*, 151 O. S. 81. The burden is upon the Relator to clearly establish such legal right to the writ. *State ex rel. Adams v. Rockwell*, 167 O. S. 15. If the evidence is cloudy, then it is the duty of the Court to deny the writ.

As was stated by the Court in *State ex rel. Gallinger v. Smith*, 71 O. S. 13, 18, and ofttimes reiterated by this Court:

> "It must now be accepted as a thoroughly well settled rule, that a peremptory writ of mandamus will not, in any case, be granted, unless *the right of the relator thereto be clear*, and *the act*, performance of which is desired, *be one of absolute obligation on the part of the officer* sought to be coerced; and before such writ will be allowed the relator must show not only *a clear legal right to have done the specific act desired*, but to *have it done by the particular person or officer sought to be coerced*; and a plain dereliction of duty must be established against such person or officer before the writ will be awarded." (Emphasis supplied.)

The judicial policy in Ohio of declining to issue writs of mandamus in controversies over public utility contracts is not unlike the jurisdictional rule followed by this Court in many appeals. It has steadfastly held to the proposition that the powers of municipalities and their exercise are subjects for local control by the State courts. Especially is this true within the area of litigation seeking interpretation of a public utility franchise or a contract, as in this case. *St. Paul Gas & Light Co. v. St. Paul*, 181 U. S. 142. There, the appeal involved the question of interpretation of a Charter and a subsequent resolution of the City requiring removal of equipment from the public streets.

The opinion states, p. 149:

"But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determinable ultimately in this court. Thus reduce the proposition to its ultimate conception to demonstrate its error."

See also *Western Union Telegraph Co. v. Georgia*, 269 U. S. 67.

Appellant seeks by this action a writ of mandamus to compel issuance by the Council of the City of Euclid of a permit and, at the same time, requests the Court to strike down the only ordinance whereby the Council had provided for issuing permits. Ohio follows the federal rule whereby a Relator "cannot be heard to question the validity of the very power the exercise of which Relator, by this action, is asking the Court to compel." *Wall v. Parrott Silver & Copper Co.*, 244 U. S. 407; followed in *State ex rel. Synod of Ohio v. Joseph*, 139 O. S. 229.

b. In Ohio no public utility may occupy the streets of a municipality without the specific consent of such municipality.

This proposition is conceded by the Appellant, but for our purposes here we believe a history of the development of such rule would be helpful.

As pointed out, Sec. 4, Art. XVIII, of the Ohio Constitution empowers a municipality to either operate its own electric power facility or "contract with others." Thus, Appellant's relations with the City of Euclid must be the subject of contract. By virtue of the Home Rule provision in the Ohio Constitution, Sec. 3, Art. XVIII, the City of Euclid may exercise police power so long as it is

not in conflict with the general laws of the State of Ohio. In the majority opinion of this case, it is stated

"Section 715.27, Revised Code, provides:

'*Any municipal corporation may:*

'* * *

'(B) *Regulate the construction and repair of wires, poles, plants, and all equipment to be used for the generation and application of electricity* * * *.' (Emphasis added.)

Section 4933.13, Revised Code provides:

'A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. *With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity* for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires.' (Emphasis added.)

Section 4933.16, Revised Code, provides:

'No person or company shall place, string, construct, or maintain a line, wire, fixture, or appliance of any kind to conduct electricity for lighting, heating, or power purposes through a street, alley, lane, square, place, or land of a municipal corporation *without the consent of such municipal corporation.*

'This prohibition extends to all levels above or below the surface of such public ways, grounds, or places, as well as along their surfaces, but not to rights

received through and exercised under proceedings of a Probate Court prior to February 26, 1910.

'The penalty provided by Section 4933.99 of the Revised Code for a violation of this section is cumulative to other means of enforcing this section open to the municipal corporation, by way of injunction or otherwise, and is not exclusive.' (Emphasis added.)"

It is at once apparent that the Appellant must have the consent of the City of Euclid to construct any electric line, whether it be overhead or underground, and it cannot use the streets of the City without such express consent.

By Sec. 723.01, the Council of the City of Euclid is given special power as follows:

"Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance."

Sec. 711.07, Revised Code, provides that the dedication of a street in a municipal corporation shall constitute a conveyance of the fee of the land so designated so that the City of Euclid has a fee simple title to the streets which Appellant seeks to cross.

In the light of these constitutional and statutory provisions, Appellant would have no right or color to construct a pole line on a public street in Euclid without the consent of its legislative authority. The Opinion thus correctly states:

"The requirement of consent necessarily implies that the municipality may impose reasonable regu-

lations and conditions as to such construction as a condition to its consent. To interpret such requirement otherwise would be to hold that the requirement of consent is a mere empty thing of no meaning. This we cannot do, since it is a basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute, it is inserted to accomplish some definite purpose."

Whether or not the Appellant can occupy any of the streets of the City of Euclid is a non-federal question. Such is the specific complaint made in the Petition. It was charged the Respondents were excluding the Appellant from occupying the City's streets by failure to issue a permit therefor to string uninsulated wires carrying 132,000 volts across such streets.

c. The cases cited do not support the proposition that a federal question is presented by this appeal.

The cases cited were also cited in the Supreme Court of Ohio. They do not lend authority to the proposition that this appeal presents a federal question.

Appellant relies heavily upon *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U. S. 405 (1935). There, the suit was under the Uniform Declaratory Judgment Act of Tennessee. It was brought in a chancery court—not a mandamus action. The sole purpose of the suit was to determine the constitutionality of an order entered by the Commission, which was authorized by the Tennessee statute to require separation of grade crossings, if, in its discretion, such elimination was necessary to protect users of the highway. The Court specifically found that the Supreme Court of Tennessee had declined to consider certain special facts relied upon as showing the

order to be unreasonable. What were the special facts? That users of the highways (trucks) would compete with the railroad; the evidence showed a declining revenue for passenger traffic because buses were carrying passengers as well as pleasure cars; owners of buses and trucks were beneficiaries, since the occasion for separation of grade crossings had shifted from the danger of rail operations to intensify motor competition and the facilities so provided increased the speed of motor traffic. Thus, there was the question of whether the State's share of the cost of elimination raised by taxation was actually being used to the serious detriment of the railroad. Assessments for public improvement laid "on particular property owners are ordinarily constitutional only if based on benefits received by them." Mr. Justice Brandeis stated (431):

> "No case involving like conditions has been found in any of the lower federal courts; nor, excepting the case here under review, has any subject been found among the decisions of the highest courts of any state."

Clearly the facts in that case are different from this case. The statement above quoted still appears unchallenged. *Shepard's Service.* There appears no application of this case to an appeal to this Court from any other State decision. The other case relied upon is *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg,* 282 U. S. 162 (1930). A Nebraska law required a railroad to construct an underground cattle-pass across its right-of-way partly at the expense of the company and not as a safety measure, but for the convenience of any farmer owning land on both sides of the railroad. The Court found there was nothing in the record to suggest that the order was either requested or granted as a safety meas-

ure. The order was solely for the convenience of a private land owner. The case is clearly distinguishable.

Finally, we contend that the Supreme Court of Ohio did not refuse to consider the unconstitutionality of Ordinance No. 288-1956 of the City of Euclid, as amended, when applied to the particular evidence in the case. On rehearing, this specific question was presented to the Court, and it adhered to the former decision.

d. There is no substance in the proposition that the Supreme Court of Ohio denied Appellant a fair hearing.

As shown, the lower Court allowed an application of Appellant for rehearing. The same arguments were then presented by learned counsel, as set forth in Appellant's Brief in this Court. The same authorities were cited.

The syllabus of this case does not support the charge that the Supreme Court of Ohio took judicial notice of any fact. But if it did, error could not be charged. All Courts judicially notice such facts as they are bound to know and of such common knowledge as is known to the public generally. In a previous decision, *Arnold v. Ohio Gas & Electric Co.*, 28 O. App. 434 (Motion to Certify overruled June 19, 1929), paragraphs 3 and 4 of the syllabus read:

> "3. The court takes judicial notice of the fact that *uninsulated wires charged with electric currents of high voltage are dangerous to life.* (Emphasis supplied.)
>
> 4. Sec. 9195, General Code, requiring electric line and power wires maintained in public streets to be covered with waterproof insulation was passed for the protection of the public, and violation thereof is negligence per se."

In the area of constitutionality, a Court can only judge of the operations of a Statute "through facts of which it will take judicial notice." It cannot take testimony to determine the operations of the Statute and "thereby declare it unconstitutional." *State v. Nelson*, 52 O. S. 88 (1894); *Andrews v. Tax Commission*, 135 O. S. 374 (1939).

The cases cited by Appellant are not helpful, as they do not present the facts of this appeal. There is no instance in this case where the Supreme Court of Ohio refused or failed to consider all of the evidence in the record before it. Such Court did not hear the evidence. It reviewed the evidence offered below. No evidence was offered in the Supreme Court. Thus, it cannot here be charged with refusing something Appellant never offered. No infringement of rights by denial of fair hearing occurred in the Supreme Court. Appellant was allowed every consideration, including a rehearing.

Having reviewed the evidence in the record before it, and after Appellant through learned counsel was afforded opportunity to present the questions to be resolved, the Supreme Court of Ohio concluded: (1) that Appellant could only occupy streets in the City of Euclid under the City's consent and reasonable regulations, and (2) that a regulation requiring underground construction over streets of a 132,000 volt line was reasonable.

2. THE JUDGMENT OF THE SUPREME COURT OF OHIO RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

At page 29 of its Brief, Appellant states the following:

> "It is conceded by Relator-Appellant that if a transmission line is such a danger to the traveling public as to reasonably require its elimination, it may be

validly required to be placed underground if that will accomplish the objects sought."

For many years the State of Ohio required that all wires "shall be covered with a waterproof insulation." This wise provision was adopted on May 12, 1886. It remained in the statutory law until 1929, when the legislature amended then existing Sec. 9155 of the General Code of Ohio. During that entire period, no attack appears to have been made upon the constitutionality or validity of this provision. It was accepted by the electric companies as being a valid and constitutional requirement. The effect of the amendment was to revest in municipal governments the complete authority and jurisdiction over such wires under the Home Rule provision of the Ohio Constitution. Art. XVIII, Sec. 3.

Ordinance No. 32 which Appellant claims is its contract provides in Sec. 2 as follows:

> "Sec. 2: *All wires* used by The Cleveland Electric Illuminating Co. *shall be properly insulated*, and shall comply with all state regulations and ordinances to be passed by this Village requiring proper insulation and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland. And this grant shall be subject to all general ordinances now or hereafter in force in said village." (Emphasis added.)

By the plain wording of Appellant's contract, it is required to "properly insulate" all of its wires which it may attempt to string over public streets. Its action in this case, however, is an attempt to string uninsulated wires across public streets. Under the permit ordinance of the City, it has the alternative then to go underground. The question of interpretation of Sec. 2 is non-federal.

Also, by the plain language of this section, the Appellant is "subject to all general ordinances now or hereafter in force." In the Petition, it is alleged that the ordinances complained of are general ordinances. The question of whether the Appellant is subject to such general ordinances is then a non-federal one.

Underground installation of electric wires and conduits, by exercise of the local police power, is not new. In 1884 the legislature of New York State adopted a Statute providing for the placing of electric wires and conduits, in cities exceeding 500,000 inhabitants, under the streets and subject to the control of local authorities. Laws of 1884, c. 534, Sec. 1. The validity of this Statute was questioned in several cases and at the level of the Court of Appeals of New York was sustained. *People ex rel. New York Electric Lines Co. v. Squire, etc.*, 107 N. Y. 593, 14 N. E. 820. In commenting on the Statute, it was stated in the Opinion:

> "These statutes were obviously intended to restrain and control, as far as practicable, the affairs alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the affairs which had grown to be almost, if not quite, intolerable to the public."

This same Court again had the question in *American Rapid Telegraph Co. v. Hess, et al.*, 125 N. Y. 641, 26 N. E. 919 (1891). There, the Plaintiff claimed it had an inviolable contract protected under the Federal Constitution, and neither the State nor the City could cause its poles and wires to be removed from the streets, excepting upon payment of compensation. The Court held the legislature

could not divest itself of its police power and its control "over the streets for the public welfare." The overhead wires being maintained "thus became a nuisance," the Opinion stating:

> "Who shall judge whether they uncommode the public use of the streets? It is unquestioned that they do, and the legislature has determined that fact, and, when the plaintiff maintained its wires and poles in the streets in such a manner as to uncommode the public use of the streets, the legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended."

Ohio is in harmony with the New York rule. It is stated in the first and second paragraphs of the syllabus in *City of Mt. Vernon v. Berman & Reed*, 100 O. S. 1:

> "1. The paramount purpose for which the streets of a municipality are dedicated and opened is to facilitate travel and transportation. They are held in trust for the benefit of the public and are required to be kept open and free from nuisance.
>
> 2. Rights in streets or highways granted to public service corporations are at all times held in subordination to the superior public rights."

In Pennsylvania, the rule is stated in appeal of *Bell Telephone Co. of Pennsylvania*, 138 Pa. Supp. 527, 10 A (2d) 817 (1940). There, the Court held that the Pennsylvania legislature was proceeding within its lawful exercise of police power in requiring both telephone and electric wires to be placed underground in conduit. The telephone company contested the validity of an ordinance of the Village of Eldred, with a population of 1,128, in requiring all wires on its main street to be placed underground. In hold-

ing the ordinance constitutional and reasonable, the Court stated, it:

> "would not substitute their judgment for that of the body to whom the exercise of the discretion is committed."

It discussed the question of increased cost initially to the utility, and concluded:

> "The argument also ignores the fact that the legislature has deemed it wise that boroughs should, at least in congested areas, have the privilege of requiring utilities to place their wires underground. The legislature having so determined, it only becomes a question of arranging the rates so that a proper revenue will be received by the utility. In so acting, the legislature was proceeding with its police powers."

CONCLUSION.

This appeal does not, as the portions of the record before this Court show, present any substantial federal question. The question which was determined was whether a writ of mandamus could issue from the Court of Appeals for the Eighth Judicial District of Ohio. The Supreme Court of Ohio determined the Petition for such extraordinary writ should be denied. Such judgment is purely one of local law.

The judgment of the Supreme Court of Ohio rests on an adequate non-federal basis. Appellant sought a permit for a 132,000 volt tower transmission line, with uninsulated wires across public streets in Euclid, Ohio. The statutory law of Ohio requires consent of the legislative authority. Under its Home Rule powers, Euclid has the sole control over its streets. It may refuse consent to string uninsulated wires.

The Appellant's franchise contract was "subject to all general ordinances now or hereafter in force." It con-

cedes the ordinance requiring underground installation of uninsulated wires is a general ordinance. It follows that Appellant must perform and be bound by the provisions of its contract whereby all wires strung overhead shall be properly insulated.

Finally, there is the long line of cases where this Court has declined jurisdiction of controversies over interpretation of provisions in contracts between utilities and municipal corporations. The dispute here has no federal cognizance, and the appeal should be dismissed.

Respectfully submitted,

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